92-1703

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MICHAEL J. NEWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER UNDER 18 U.S.C. SEC. 3742(e) THE FIRST CIRCUIT COURT OF APPEALS MAY REFUSE TO REVIEW FOR MORE THAN "CLEAR ERROR" THE LEGAL CONSTRUCTION OF THE TERM "SERIOUS BODILY INJURY" AS IT IS USED IN THE UNITED STATES SENTENCING GUIDELINES, WHERE:

- THE FACTS ARE UNDISPUTED;

- THE DEFENDANT HAS CHALLENGED THE DISTRICT COURT'S INTERPRETATION OF THE SCOPE OF THIS TERM;

- THE DISTRICT COURT PAID LITTLE OR NO ATTENTION TO THE TERM'S INTERPRETATION; AND

- THE APPLICATION OF THIS TERM HAS AN OVERWHELMING IMPACT ON THE SENTENCE OF ANY DEFENDANT TO WHOM THE TERM IS APPLIED, AUGMENTING THE SENTENCE FIVE-FOLD.

II. WHETHER AS A MATTER OF LAW PETITIONER'S SENTENCE MAY BE ENHANCED TWICE UNDER THE UNITED STATES SENTENCING GUIDELINES ON THE SINGLE GROUND THAT HE CAUSED "SERIOUS BODILY INJURY".

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Michael J. Newman prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered on December 31, 1992.

CITATION TO OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported as *United States of America v. Michael J. Newman*, 982 F.2d 665 (1st Cir. 1992), and is reproduced in its original form as Appendix A. The First Circuit Court of Appeals issued an Errata Sheet amending the original Opinion on January 22, 1993. This Errata Sheet is reproduced as Appendix B.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the First Circuit were entered on December 31, 1992. Petition for Rehearing and Suggestion for Rehearing En Banc were denied on January 22, 1993. A copy of the Order denying the Petition is reproduced as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

FEDERAL STATUTE INVOLVED

This case involves 18 U.S.C. Sec. 3742(e) which provides:

> Upon review of the record, the court of appeals shall determine whether the sentence –
>
> (a) was imposed in violation of the law;
>
> (b) was imposed as a result of an incorrect application of the sentencing guidelines; . . .
>
> The courts of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous, and shall give due deference to the district court's application of the guidelines to the facts.

STATEMENT OF THE CASE

Petitioner presents a question concerning the scope of review applicable to a sentence imposed under the United States Sentencing Guidelines ("Guidelines"). He questions whether, under 18 U.S.C. Sec. 3742(e), the First Circuit Court of Appeals may refuse to review for more than "clear error" the difference between the terms "bodily injury" and "serious bodily injury" under the Guidelines, where the facts are undisputed, the petitioner has challenged the district court's construction of these terms, the district court paid scant heed to the legal questions raised by the defendant's challenge, and the legal interpretation of the word "serious" has an overwhelming impact on the sentence of any defendant in petitioner's position, augmenting the sentence fivefold. He also questions whether the First Circuit erred as a matter of law when it held that the "serious bodily

injury" enhancement may permissibly be counted twice under the Guidelines.

The First Circuit takes a radical position on the applicable scope of review, in apparent conflict with the Court's decision in *Braxton v. United States*, ___ U.S. ___, 111 S.Ct. 1854 (1991), and at odds with the principles applied by most other circuit courts of appeal.

This Court in *Braxton* held that the Fourth Circuit should have conducted review *de novo* when an appellant challenged whether the facts fell within the ambit of a Guideline phrase (in that case, a phrase concerning what a stipulation "specifically established"). This Court reversed the Fourth Circuit's application of the "clear error" standard.

By contrast, the First Circuit has taken the position that, when a sentencing issue involves a mixed question of law and fact requiring the court to evaluate whether a Guideline standard reaches the undisputed facts, the court will review for "clear error" only, and will refuse to conduct more expansive review, even when the defendant has challenged the construction of the Guideline term at issue in the law/fact mix.

Other circuit courts do not agree, following principles established in *Braxton*. The Eighth Circuit stands in direct conflict with the First Circuit, holding that review *de novo* must be provided when an appellant challenges whether a particular injury amounts to "bodily injury" under the Guidelines. Other circuits all but unanimously agree that challenges to the legal interpretation of a Guideline term or phrase must be reviewed broadly when

an appellant challenges the ultimate legal significance of the underlying facts.

The circuits are also in conflict as to when and whether "double counting" of the same offense characteristic – here, for having caused "serious bodily injury" – is permitted under the Guidelines. Some circuits hold, with the First Circuit, that "double counting" is permitted whenever the Guidelines do not expressly forbid it. Others hold that "double counting" the same offense characteristic is not permitted unless the Guidelines clearly so provide.

Sentencing decisions, no less than convictions themselves, must be firmly rooted in accepted principles of law. Our legal system develops and nurtures those roots as much by providing appellate review as by mandating basic tenets of due process. When questions of legal interpretation go no further than the district court, those roots simply cannot develop. Each district court, unrooted, is free to interpret the Guideline rules as it sees fit, resulting in conflicting sentences for similar conduct.

Such conflict is intolerable and entirely inconsistent with one of the fundamental purposes of the Guidelines themselves – fair uniformity in sentencing.

Petitioner asks that this Court grant his petition for certiorari to resolve these conflicts, to bring the First Circuit's standard of review in line with principles enunciated in this Court's decision in *Braxton*, with other circuit courts of appeals and with the mandate of applicable federal law, 18 U.S.C. Sec. 3742(e), and to resolve circuit conflict concerning "double counting" under the Sentencing Guidelines.

1. Factual Background

Petitioner's conviction arose out of an incident that occurred in the cell block of the Providence, Rhode Island police station. Appellant will briefly recount the facts which gave rise to this conviction and which underlie the legal question he raised before the First Circuit – that is, whether the injuries he caused constituted "serious bodily injury" or more simply "bodily injury" alone.

Petitioner was a young patrol officer assigned the position as turnkey one night when one Daniel Peterson was brought in on an arrest for public drunkenness. Tr. A 36. Peterson came to jail with alcohol and cocaine in his system. *Discharge Summary of St. Joseph's Hospital,* First Circuit Appendix A, p. 10. Once he was placed in a cell, he began screaming, and then, with a Herculean effort, he ripped the toilet from the wall, and, still full of water, threw it through the bars. Tr. A 78, 167.

When petitioner and his superior took steps to move Peterson to a new cell, Peterson resisted, resulting in a "pretty violent struggle", according to petitioner's superior. Tr. A 168. Once Peterson was moved and had calmed down, petitioner testified that he returned to uncuff him. Once one hand was uncuffed, again according to petitioner, Peterson attacked him, swinging the handcuff with a crazed look on his face. In response, petitioner punched him until he was subdued. Tr. D 51-2. Peterson's testimony was different. According to Peterson, petitioner's punches were unprovoked and occurred while he was still handcuffed to the cell bars. Tr. A 86. The Government's witness estimated that the struggle lasted about twenty seconds. Tr. B 25.

Based upon this evidence, the jury returned a verdict of guilt under 18 U.S.C. Sec. 242 (violation of civil rights), and found specifically that bodily injury had resulted. The jury did not assess the severity of the injury.

At sentencing, the Guidelines required an assessment of the severity of injuries Peterson concededly suffered at appellant's hands. The facts were undisputed. Peterson had swollen eyes and blood around his nose and lips. Tr. B 56. Police witnesses saw Peterson on his knees having dry heaves, presumably from having been hit in the stomach area. Tr. C 24. He was, however, ambulatory and able to walk to the sink outside the cell to wash off his face. Tr. A 89; Tr. C 172.

Peterson complained of headaches, dizziness and ringing in his ears, and was taken to St. Joseph's Hospital, where he was examined at the emergency room. He remained in there for six days as test after test was run on him to determine whether his symptoms were expressions of serious injury. Every test proved negative.[1] The

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[1] A C.A.T. scan was negative for both the brain and the abdomen. First Circuit Appendix A at 11. He had a clear urine, thereby indicating no kidney problem. *Id.* at 9, 10. There was no fracture of either the facial bones or the ribs. *Id.* at 11, 38, 40. His spine and skull were fine. *Id.* at 11, 39. His E.E.G. was normal. *Id.* at 11, 37. And his blood work was without indication, other than a positive result for cocaine. *Id.* at 10, 48. The examining personnel did note that he had numerous remnants of an old injury from a serious automobile accident back in 1989. *Id.* at 9, 18. He told the hospital staff that his right leg "felt funny" ever since that time. *Id.* at 18. He was also missing a left kidney – a congenital defect. *Id.* at 18. An examination showed "old scarring of the ear drums," but was otherwise "unrevealing". Tr. C 97. A neurosurgeon's examination likewise failed to reveal any long-term injury.

only thing actually done for him, other than testing, was to dispense antivert, an antihistamine used to combat motion sickness. Circuit Court Appendix A at 11.

2. Sentence

Based on the evidence, the trial court concluded that the appropriate offense level was 25 and sentenced petitioner to five years to serve. The trial court reached this conclusion *inter alia* by concluding that Peterson's injuries constituted "serious bodily injury" as that term is defined in the sentencing Guidelines, and not "bodily injury" alone. Had the trial court concluded that Peterson suffered "bodily injury", the appropriate offense level would have been 12, warranting a sentence approximately one fifth as long (ten to 16 months).

The district court applied the "serious bodily injury" enhancement under two separate sections of the Guidelines. Having chosen to apply the "aggravated assault" Guideline on the ground that Peterson had suffered "serious bodily injury",[2] the court then added 4 further levels again for "serious bodily injury", as section

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[2] The Guideline applicable to petitioner's offense (18 U.S.C. Sec. 242) sets a base offense level of 6, plus the offense level applicable to any underlying offense. The underlying offense would have been either "Aggravated Assault" under Sec. 2A2.2 or "Minor Assault" under 2A2.3. "Aggravated Assault" is defined in the Application Notes to Sec. 2A2.2 as "a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (*i.e.*, not to merely fight), or (b) *serious bodily injury*, or (c) an intent to commit another felony" (emphasis added). Minor assault covers "a felonious assault not covered by Sec. 2A2.2." Application Note 1 to Sec. 2A2.3.

2A2.2(b)(3) increases the offense level according to the seriousness of the injury caused. Thus, the factor "serious bodily injury" was in effect used twice: first to determine the applicable Guideline (here Sec. 2A2.2); and, second, as a specific offense characteristic which increased the base level an additional four points.

3. Appeal

On appeal, the First Circuit Court of Appeals upheld petitioner's sentence, holding that the district court's resort to "serious bodily injury" enhancement was not "clearly erroneous". The First Circuit refused to review the district court's interpretation of the term "serious bodily injury" more expansively for two stated reasons: first, because of what the court called the parties' "concession" that the question presented a mixed question of law and fact (Appendix A, p.12); and, later, in an Errata Sheet, on the additional ground that resolution of the question "called for a fact dominated evaluative judgment." Appendix B.[3]

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[3] The First Circuit's original decision denied more expansive review solely because petitioner acknowledged that the issue involved a mixed question of law and fact. Appendix A, p.12. After petitioner asked for reconsideration, calling the court's attention to the fact that no other circuit court in the country would limit review of *every* mixed question of law and fact, the court essentially blamed its secretary, and issued what it called an "Errata Sheet", adding a second ground for its decision on scope of review. For reasons discussed *infra*, this addition does little to bring the First Circuit in line with this Court or with decisions of the other circuit courts of appeals on this issue.

The First Circuit also declined to reverse on the ground that the "serious bodily injury" enhancement had been impermissibly double counted, holding that the Guidelines were intended to increase the petitioner's sentence twice on that account.

ARGUMENT

I. THE FIRST CIRCUIT'S REFUSAL TO REVIEW THE DISTRICT COURT'S CONSTRUCTION OF THE TERM "SERIOUS BODILY INJURY" FOR MORE THAN "CLEAR ERROR" IS INCONSISTENT WITH THE PRINCIPLES ENUNCIATED IN THIS COURT'S DECISION IN *BRAXTON V. UNITED STATES*, CONFLICTS WITH THE SCOPE OF REVIEW APPLIED BY OTHER CIRCUIT COURTS OF APPEALS, AND WILL UNDERMINE A CRITICALLY IMPORTANT GOAL OF THE UNITED STATES SENTENCING GUIDELINES – *I.E.*, FAIR UNIFORMITY IN SENTENCING DECISIONS.

Circuit courts of appeals must review and remand any sentence "imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. Sec. 3742(e)(2). "Findings of fact" are reversed for clear error only – a rule axiomatic across the country – while the "application of the guidelines to the facts" is afforded "due deference", a more subtle standard which has given rise to conflict among the circuits, and, in particular, between the First Circuit and most other circuit courts of appeals. 18 U.S.C. Sec. 3742(e).

In *Braxton v. United States, supra*, this Court made it clear that, where the legal interpretation of a Guideline term is at issue, "due deference" must mean review *de*

novo. The Fourth Circuit in *Braxton* had afforded only "clear error" review of a district court Guideline ruling concerning whether a plea stipulation "specifically established" a violation of a particular statute. The question was the legal reach of the phrase "specifically established". This Court held that this was a legal question which warranted review *de novo*, explicitly rejecting the Fourth Circuit's limited "clear error" review.

The Eighth Circuit has faced nearly the identical question raised here – what scope of review applies when an appellant questions whether a particular injury constitutes "bodily injury" under the Guidelines – and has unequivocally held that it is review *de novo*. "As the issue involves an interpretation of the scope of the guidelines, it is an issue of law that this court reviews *de novo*." *United States v. Yankton*, ___ F.2d ___ (8th Cir. 1993), 1993 WL 49682 (8th Cir.(N.D.))(Eighth Circuit rejects Government argument that rape-induced pregnancy with tragic consequences (fetal death of one twin and death at three weeks of another) should be deemed "serious bodily injury" under the Guidelines).

In direct conflict with the Eighth Circuit in *Yankton*, and in apparent conflict with this Court in *Braxton*, the First Circuit here has limited its review of the legal ambit of the Guideline term "serious bodily injury" to review for "clear error" only. The petitioner had unequivocally challenged the district court's construction of this term. Petitioner did not challenge the facts – they were not in dispute. Rather, the question was whether the injuries which petitioner had concededly caused constituted "bodily injury" – that is, as defined in the Guideline Notes, a "*significant injury; e.g.*, an injury that is painful

and obvious, or is *of a type for which medical attention ordinarily would be sought*", or whether, on the other hand, petitioner had caused the more extreme "serious bodily injury" – that is, "injury involving extreme physical pain or the *impairment of a function of a bodily member, organ,* or mental faculty; or *requiring medical intervention such as* surgery, *hospitalization,* or physical rehabilitation" (emphasis added). United States Sentencing Guidelines, Application Notes to Sec. 1B1.1(b) and (h).[4]

Petitioner thereby posed legal questions, not factual ones. He called upon the court to construe the intention of the drafters of the Guidelines concerning the policies underlying a term which multiplied his sentence fivefold. The District Court had not considered these questions at

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[4] The petitioner specifically sought review of the ambit of the phrase "requiring medical intervention, such as . . . hospitalization." It was undisputed that Peterson remained in the hospital for six days, but it was also undisputed that he was held essentially for observation, and that every test conducted on him proved negative. He was not provided any medical treatment other than an antihistamine that could readily have been dispensed outside a hospital. Petitioner questioned whether hospitalization was "required" under such circumstances.

He also questioned the ambit of the phrase "impairment of a function of a bodily member [or] organ . . . " The district court had erroneously equated "impairment" with "injury", holding that bruises, bleeding and an "injury to his ear" must amount to "an impairment" without any acknowledgment that "significant injuries" (as opposed to "impairment" of a member or organ) are defined under the Guidelines as "bodily injury", not "serious bodily injury".

all, even though these distinctions meant the difference between one year and five years in prison.[5]

The First Circuit took the position in this case, as it has in others, that a sentencing court is more or less the last word, reviewable for clear error only, whenever a sentencing decision rests on a judgment as to whether the facts come within the reach of a Guideline term. Summing up First Circuit precedent on the scope of review of mixed questions of law and fact, the First Circuit has concluded: "We think that under First Circuit precedent the 'due deference mandate' of the statute [18 U.S.C. Sec. 3742] to the district court's application of the guidelines to the facts translates into a 'clearly erroneous' standard of review." *United States v. Pilgrim Market Corporation*, 944 F.2d 14, 17 (1st Cir. 1991).

The First Circuit has acknowledged that its position on scope of review is out of step with other circuits. *Id.*, fn.2 ("we are aware, of course, that other circuits have used the *de novo* standard in grouping cases"). The Seventh Circuit has noted a more general conflict with First

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[5] The full extent of the trial court's discussion of these critical issues was the following:

> I do not believe there is any merit at all to this objection [concerning the "serious bodily injury" enhancement]. The plaintiff suffered bruises to his face, his body, and my recollection is that there was bleeding. His eyes were beaten, his scalp was injured. There was an injury to his ear. In short, it resulted in six days of hospitalization. I don't think I need say anything more.

Tr. F 12.

Circuit precedent on the scope of review of mixed questions of law and fact under the Sentencing Guidelines. *United States v. Jordan*, 890 F.2d 968, 972, fn.8 (7th Cir. 1989)("though it has been suggested that appellate courts should . . . use a 'clearly erroneous' standard to review applications of the Guidelines, *see, e.g., United States v. Wright*, 873 F.2d 437, 443-4 (1st Cir. 1989), the legislative history of the adoption of the 'due deference' standard indicates that a sliding scale is appropriate . . . " (quotation from Congressional record omitted)).

Circuit courts around the country all but universally review *de novo* mixed law/fact questions where the legal scope of a Guideline term is at stake.[6] At least one circuit

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[6] *E.g., United States v. Revel*, 971 F.2d 656, 660 (11th Cir. 1992)(findings of fact are reviewed for clear error, but cases involving "the interpretation of scope of the Guideline" warrant *de novo* review); *United States v. Chartier*, 970 F.2d 1009, 1015 (2d Cir. 1992)(the standard of review of sentencing issues is mixed, with questions concerning the construction of a guideline term (in this case, the definition of "common scheme or plan") receiving *de novo* review, and findings as to whether or not conduct occurred as part of a common plan reviewed for clear error); *United States v. Kosth*, 943 F.2d 798, 800 (7th Cir. 1991)("we review the legal meaning of such language as 'position of trust' under the *de novo* standard" (footnote omitted)); *United States v. Davis*, 922 F.2d 1385, 1387-8 (9th Cir. 1991)("we review *de novo* a district court's application of the United States Sentencing Guidelines, to the extent that such application involves a mixed question of law and fact", although district court's findings of fact are reversed for clear error only); *United States v. Hill*, 915 F.2d 502, 505 (9th Cir. 1990)(legal issues are reviewed *de novo* and factual ones for clear error; a district court's application of the guideline is reviewed *de novo*, and question whether defendant may be in a position of trust is a legal issue subject to *de novo* review); *United States v. Roberts*, 898 F.2d 1465, 1468-9 (10th

will always review the application of the Guidelines to undisputed facts *de novo*. *United States v. Sivils*, 960 F.2d 587, 596 (6th Cir. 1992). Others articulate a sliding scale: "On mixed questions of fact and law, there is no bright-line standard, but rather a sliding scale depending on the 'mix' of the mixed question." *United States v. Stokley, supra*. *Accord, United States v. Roberts, supra*; *United States v. Jordan, supra*. Sometimes the legal question is unhinged from the factual one, with the legal question reviewed *de novo* and the underlying facts for "clear error". *E.g., United States v. Chartier, supra*.

Thus, where a truck driver challenged an "abuse of trust" enhancement to his sentence, the Ninth Circuit

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Cir. 1990)(mixed questions of law and fact are reviewed on a sliding scale, as required by the legislative history of the sentencing statute; where the question is primarily factual, the clearly erroneous standard is appropriate; where, however, a mixed question primarily involves consideration of legal principles or the legal interpretation of a guideline, review moves closer to *de novo*); *United States v. Werlinger*, 894 F.2d 1015, 1016 (8th Cir. 1990)(whether defendant's conduct amounts to willful obstruction "calls for an interpretation of the scope of the guideline" which is "therefore a question of law which this court may review *de novo*"); *United States v. Wickstrom*, 893 F.2d 30, 31 (3rd Cir. 1989)(Third Circuit's review of whether silencer is a firearm is plenary "since it involves a matter of statutory interpretation"); *United States v. Burke*, 888 F.2d 862, 865 (D.C.Cir. 1989)(whether the Guidelines authorize two-level increment for even the unwitting possession of a firearm is a legal question reviewed *de novo*); *United States v. Stokley*, 881 F.2d 114, 115-16 (4th Cir. 1989)("on mixed questions of fact and law, there is no bright-line standard, but rather a sliding scale depending on the 'mix' of the mixed question"; primarily factual issues are reviewed for clear error, while questions of legal interpretation of the Guidelines are reviewed closer to *de novo*).

reviewed *de novo* the question of whether a truck driver may be in a position of trust *vis a vis* the people who own the truck's cargo. *United States v. Hill, supra. See also, United States v. Kosth, supra* at 800. ("we review the legal meaning of such language as 'position of trust' under the *de novo* standard" (footnote omitted)). The Fourth Circuit has reviewed *de novo* whether a defendant's behavior amounted to "physical[ly] restrain[t]". *United States v. Stokley, supra*. The Third Circuit has reviewed *de novo* the very term at issue here – the ambit of the modifier "serious", albeit in a different Guideline context. *United States v. Inigo*, 925 F.2d 641 (3rd Cir. 1991).

Interpreting a modifier like the term "serious" is similar to providing a legal interpretation of the term "material" (*United States v. Gardiner*, 955 F.2d 1492, 1499 (11th Cir. 1992)(construing the Guideline term "material" as a matter of law)) or, in another context, to providing legal guidance concerning the meaning of the term "voluntary". *Arizona v. Fulminante*, ___ U.S. ___, 111 S.Ct. 1246, 1252 (1991)("we normally give great deference to the factual findings of the state court. . . . Nevertheless, 'the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination' ")(citations omitted). All these terms call upon courts to make evaluative judgments concerning where on the spectrum of human behavior a certain mandate must fall. They do not require review of the district court's findings of fact (although they too may be reviewed separately for clear error if disputed), but rather a judgment concerning the

meaning of the law.[7] That judgment concerns a legal definition, not a finding of facts or a finding concerning inferences which can be fairly drawn from the facts.[8]

Deference to a trial court's fact-finding "does not inhibit an appellate court's power to correct errors of law,

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[7] In this case, that judgment might be that hospitalization is "required" when *treatment* available only in a hospital is necessary (as petitioner urges), or it might be that hospitalization is "required" whenever an injured person is seen in an emergency room or held overnight for testing, whether treatment is ultimately dispensed or not (as the district court apparently concluded).

Petitioner's arguments on this score were compelling. Even a gunshot wound has been deemed less than "serious bodily injury" under the Guidelines. *United States v. Kleinebreil*, 966 F.2d 945, 946 (5th Cir. 1992)(two federal officers were shot, only one sustaining "serious bodily injury"). The Sixth Circuit has upheld a finding of "bodily injury" alone (not "serious bodily injury") where the victim was beaten and kicked, resulting in numerous abrasions and the hyperextension of a shoulder necessitating a hospital visit and x-rays, as well as pain in knee and elbow lasting for two weeks. *United States v. Muhammed*, 948 F.2d 1449, 1456 (6th Cir. 1991), *cert. den.*, 112 S.Ct. 590 (1992). *Compare, United States v. Snider*, 976 F.2d 1249 (9th Cir. 1992)(a beating that results in a broken jawbone is "serious bodily injury" under the Guidelines).

[8] The distinction between inferences of fact and conclusions of law is easily drawn here. The district court judge made an inference from the undisputed facts when he concluded, based on evidence that Peterson had ringing in his ears, that Peterson had sustained some form of ear injury. That finding was entitled to deference and clear error review. Whether such an ear "injury" amounted to an "impairment", justifying a "serious bodily injury" enhancement, or rather amounted to a "significant injury", warranting the dramatically reduced "bodily injury" sentence, however, is a question not of fair inferences, but of the scope of the law itself.

including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corporation v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 502 (1984). Review of such rules of law – what the First Circuit called "fact dominated evaluative judgment[s]" (App. B) – is just what the First Circuit has declined to provide. The First Circuit has responded to the "vexing nature of the distinction between questions of fact and questions of law" (*Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1981)) by denying the existence of any "law" in the law/fact mix, thereby denying sentenced defendants the review to which they are entitled as matter of law, and creating intolerable conflict among the circuits on issues of great importance to the development of the criminal law.

This is a decision of overwhelming importance. Sentencing appeals occur on a daily basis; and on a daily basis they raise questions just like the one at issue here – questions of law calling for authoritative resolution at the highest possible level. If the door is closed on questions of Guideline interpretation, the door is closed on the most fundamental function the circuit was intended to undertake. Judge by judge disparities must necessarily ensue, disparities not subject to the unifying influence of circuit court review. Fair uniformity in sentencing – one of the most critical goals of the Sentencing Guidelines – is the inevitable casualty.

II. THE CIRCUIT COURT OF APPEALS ARE IN CONFLICT CONCERNING THE STANDARD FOR DETERMINING WHEN "DOUBLE COUNTING" IS PERMISSIBLE UNDER THE UNITED STATES SENTENCING GUIDELINES, DEFEATING THE CRITICAL GUIDELINES GOAL OF FAIR UNIFORMITY IN SENTENCING.

The circuit courts of appeals are in conflict as to when and whether "double counting" is permitted under the Sentencing Guidelines. In this case, the district court used the factor "serious bodily injury" twice: first, to trigger the application of the guideline for Aggravated Assault under Sec. 2A2.2; and, second, as a four-level adjustment to the base offense level under this Guideline. Petitioner challenged this on the ground that the Guidelines did not intend such a result, citing *United States v. Fuller*, 897 F.2d 1217 (1st Cir. 1990)(holding that double counting the amount of marijuana the defendant distributed was impermissible). The First Circuit disagreed.

As the First Circuit noted in this case, the circuits are in conflict on the "double counting" question: "[T]here is a divergence between the two courts of appeals which have addressed the closely analogous question of whether defendant's base level can be increased pursuant to USSG Sec. 2A2.2(b)(2)(a) for using a *dangerous weapon*, notwithstanding that the same factor formed the predicate for finding the underlying offense an aggravated assault. . . . " (emphasis original), comparing *United States v. Williams*, 954 F.2d 204, 206-8 (4th Cir. 1992)("double counting" required), with *United States v. Hudson*, 972 F.2d 504, 506-7 (2d Cir. 1992)(expressly disagreeing with *Williams*). Circuit courts of appeals can be divided on the

"double counting" question roughly into two groups. On one hand are those who, like the First Circuit, take the narrow view that "double counting" is permissible unless the Guidelines expressly prohibit it. *E.g., United States v. Williams*, 954 F.2d 204 (4th Cir. 1992); *United States v. Curtis*, 934 F.2d 553 (4th Cir. 1991). On the other are those circuits that hold the converse and prohibit "double counting" absent an express statement that Guideline drafters intended to impose cumulative punishment for the same behavior. *E.g., United States v. Hudson*, 972 F.2d 504, 507 (2d Cir. 1992)("we choose not to follow *Williams*"); *United States v. Romano*, 970 F.2d 164, 166 (6th Cir. 1992) ("[w]e disagree with the narrow view of double counting explained in *Curtis*", instead adopting the Eighth Circuit's view that the Guidelines were not intended to punish the same conduct cumulatively under separate Guideline provisions); *United States v. Werlinger*, 894 F.2d 1015 (8th Cir. 1990). *Cf., United States v. Adelke*, 968 F.2d 1159, 1161 (11th Cir. 1992)(double counting is permissible if so intended *and* " 'each section concerns conceptually separate notions relating to sentencing' " quoting *United States v. Aimufa*, 935 F.2d 1199, 1201 (11th Cir. 1991)).

The latter view is the more persuasively reasoned, and more consistent with decisions of this Court. This Court has required a clear expression of legislative intent before cumulative sentence enhancements may be applied. *Busic v. United States*, 446 U.S. 398, 403-4 (1980); *Simpson v. United States*, 435 U.S. 6, 12-13 (1978)(holding that a statute imposing an enhanced sentence on a defendant who uses or carries a firearm while committing a federal felony is not applicable where the statute defining

the underlying felony contains its own enhancement for the same behavior).

Petitioner urges this Court to resolve the conflict among the circuits on the "double counting" issue and to bring all the circuits into conformity with principles this Court articulated in *Busic* and *Simpson*.

CONCLUSION

The decision of the United States Court of Appeals for the First Circuit is incorrect as a matter of law, and conflicts with principles enunciated in this Court's decision in *United States v. Braxton*, with the Eighth Circuit's decision in *United States v. Yankton*, and with principles underlying decisions from other circuit court appeals. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 91-2303

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL J. NEWMAN,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Raymond J. Pettine,
Senior U.S. District Judge]

Before

Cyr, *Circuit Judge,*

Roney,* *Senior Circuit Judge,*

and Pieras,** *District Judge.*

John A. MacFadyen for Appellant.

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* Of the Eleventh Circuit, sitting by designation.

** Of the District of Puerto Rico, sitting by designation.

Craig N. Moore, Assistant United States Attorney, with whom *Lincoln C. Almond*, United States Attorney, was on brief for appellee.

December 31, 1992

CYR, *Circuit Judge*. Michael J. Newman appeals his conviction and sentence on one count of depriving a pretrial detainee of his civil rights under color of law in violation of 18 U.S.C. § 242. We affirm.

I

BACKGROUND

Viewed in the light most favorable to the verdict, *see United States v. Batista-Polanco*, 927 F.2d 14, 17 (1st Cir. 1991), the evidence presented at trial warranted the following jury findings. On October 6, 1990, Daniel Peterson was arrested in Providence, Rhode Island, for drinking in public. A record check revealed outstanding warrants against Peterson. Appellant Michael J. Newman was the officer in charge of the cell block where Peterson was detained.

After being placed in a cell, Peterson began to yell and scream, then picked up the porcelain toilet in the cell and hurled it through the bars. Appellant Newman and another officer removed Peterson to a nearby cell. Peterson put up mild resistance and his wrists were handcuffed to the cell bars. Shortly after the officers left, Peterson resumed his yelling and screaming, which

prompted appellant Newman to return to the cell. While still handcuffed to the cell bars, Peterson was beaten and kicked in the stomach and head by appellant. Peterson sustained injuries to his face, nose, eyes, and inner ear, and experienced difficulty in breathing. He remained in a local hospital for a week, where he experienced dizziness, severe headaches, and other physical pain. Extensive medical tests proved negative.

Newman was indicted, tried, and convicted for interfering with Peterson's civil rights under color of law, and sentenced to sixty months in prison and a two-year term of supervised release.

II

DISCUSSION

Appellant presents four claims. First, he claims that the court committed error by excluding certain "habit" evidence proffered under Federal Rule of Evidence 406. Second, he contends that he was entitled to a new trial due to juror inattentiveness. Third, he disputes the finding that the alleged assault involved "serious bodily injury." Finally, Newman attempts for the first time to assert that the sentence imposed pursuant to U.S.S.G. §§ 2A2.2(b) (3)(B) and 2H1.4(a)(2) had the impermissible effect of "double counting" any "serious bodily injury" inflicted on Peterson.

A. Evidence Rule 406

At trial, the defense attempted to introduce Providence Police Sergeant MacDonald's testimony that he had

seen between 75 and 100 prisoners handcuffed to the cell bars, but never to the first bar. MacDonald's testimony was offered to support Newman's testimony that he had handcuffed Peterson to the third bar of the cell and not to the first bar as Peterson testified. The issue became material in light of the trial testimony of Daniel Greene, a detainee in the same cell block, who claimed to have seen Peterson's cuffed hands protruding through the bars during the assault. The evidence demonstrated that Greene could have seen Peterson's hands only if they were cuffed to the first bar. The district court sustained the government's objection to the proffered testimony.

Under Rule 406, competent evidence of a person's "habit" may be admissible to prove conduct in conformity with the habit on a particular occasion. *Reyes v. Missouri P. R. Co.*, 589 F.2d 791, 794 (5th Cir. 1979); *see also* John J. Strong, *McCormick on Evidence* § 195 (4th ed. 1992); 1A John A. Wigmore, *Evidence* § 95 (Tillers rev. 1983).[1] The party offering the evidence must establish the habitual nature of the alleged practice. *Weil v. Seltzer*, 873 F.2d 1453, 1461 (D.C. Cir. 1989). As with other exclusionary rulings, the party challenging an exclusion of habit evidence under Rule 406 bears the heavy burden of demonstrating on appeal that the trial court abused its

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[1] Evidence Rule 406 states:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Fed. R. Evid. 406.

discretion. *McWhorter v. Birmingham*, 906 F.2d 674, 675 (11th Cir. 1990); *Rosenburg v. Lincoln American Life Ins. Co.*, 883 F.2d 1328, 1337 (7th Cir. 1989); *Weil*, 873 F.2d at 1460; *United States v. Troutman*, 814 F.2d 1428, 1454 (10th Cir. 1987); *see also United States v. McCarthy*, 961 F.2d 972, 977 (1st Cir. 1992) (we review rulings on the admissibility of evidence for "abuse of discretion").

Habit evidence under Rule 406 may be probative of " 'the regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn. . . . ' " Fed. R. Evid. 406, advisory committee's note (quoting McCormick, *Evidence* § 195 at 826); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1524 (11th Cir. 1985). Although there are no "precise standards" for determining whether a behavior pattern has matured into a habit, two factors are considered controlling as a rule: "adequacy of sampling and uniformity of response." Fed. R. Evid. 406, advisory committee's notes; *McWhorter*, 906 F.2d at 679; *G.M. Brod & Co. v U.S. Home Corp.*, 759 F.2d 1526, 1533 (11th Cir. 1985); *Loughan*, 749 F.2d at 1529; *Weil*, 873 F.2d at 1460; *Reyes*, 589 F.2d at 795. These factors focus on whether the behavior at issue "occurred with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances." *Weil*, 873 F.2d at 1460. The requisite regularity is tested by the " 'ratio of reaction to situations.' " *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 512 (4th Cir. 1977) (quoting Lewan, *Rationale of Habit Evidence*, 16 Syracuse L. Rev. 39, 51 (1964)), *cert. denied*, 434 U.S. 1020 (1978); *Weil*, 873 F.2d at 1461; *Simplex, Inc. v. Diversified Energy*

Systems, Inc., 847 F.2d 1290, 1294 (7th Cir. 1988). It is essential, therefore, that the regularity of the conduct alleged to be habitual rest on an analysis of instances " 'numerous enough to [support] an inference of systematic conduct' and to establish 'one's regular response to a repeated specific situation.' " *Wilson*, 561 F.2d at 511 (quoting Fed. R. Evid. 406, advisory committee's notes).

Appellant's proffer failed to demonstrate the admissibility of the MacDonald testimony under Rule 406. Appellant provided no foundation for assessing the adequacy of the sampling to which MacDonald would testify. There was no evidence even approximating the number of times prisoners were handcuffed to the cell bars.[2] Absent some evidence of the number of instances in which the handcuffing practice took place, we cannot conclude that the district court abused its discretion. An officer's observation of 75 to 100 such instances did not *require* the conclusion that the putative practice was followed with the necessary regularity. *See Brod*, 759 F.2d at 1533 (testimony concerning specific instances within experience of witness, when considered in light of thousands of unobserved similar instances, " falls far short of the adequacy of sampling and uniformity of response which are the controlling considerations governing admissibility").

Other considerations reinforce the conclusion that the district court did not abuse its discretion. First, Sergeant MacDonald testified that there was no "rule or practice

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[2] The district court nonetheless allowed appellant to testify that he and other officers "always cuffed prisoners" to the third bar.

that's followed" about where to handcuff prisoners but that "[t]he officers involved . . . at the time would decide where to handcuff them and how to do it." Second, we are aware of no case, and appellant cites none, in which the routine practice of an organization, without more, has been considered probative of the conduct of a particular individual within the organization. *See United States v. Angelilli*, 660 F.2d 23, 41 (2d Cir. 1981), *cert. denied*, 455 U.S. 910, *cert. denied*, 455 U.S. 945 (1982) (questioning whether it is proper on the basis of the "ambiguous structure of Rule 406" to infer individual behavior based on evidence of routine practice of the organization). The exclusionary ruling under Evidence Rule 406 did not constitute error.

B. Juror Inattentiveness

Appellant contends that the district court (1) failed to conduct adequate inquiry into allegations that one or more jurors slept during portions of the trial, and (2) committed reversible error by denying a new trial based on the alleged juror inattentiveness.

At one point during trial, on July 10, the presiding judge observed a juror who appeared as though he may have been asleep.[3] Immediately, the judge advised all

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[3] The presiding judge described the related events as follows:

> [D]uring the trial I called counsel to the bench; as I recall, I told them that I had observed a juror with his eyes closed and that the juror may have been sleeping. I did not say the juror was sleeping, nor can it be said that he was. I did not see any jurors' head fall 'to

counsel and offered to replace the juror with an alternate. Defense counsel declined the offer. The judge promptly and firmly cautioned all members of the jury on the importance of devoting full attention to the evidence. After trial, three putative eyewitnesses submitted letters recounting their observations of one or more jurors who appeared to be sleeping during parts of the trial.[4]

These letters formed the basis for appellant's motion for new trial. The district court stated that it had "noted the incidents in question and promptly brought it to the attention of counsel in a[n] [unrecorded] bench conference," but that defense counsel rejected the court's offer

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> the side' with his chin 'on his chest' as described by one of the letter writers. Both the prosecutor and the defense counsel acknowledged they too had noticed what I observed. I offered to excuse the juror and have him replaced with an alternate. In no uncertain terms, defense counsel objected.

[4] Each of the three letters describes one juror who appeared to be asleep. Two of the letters refer to July 10 and appear to refer to the same juror and the same incident. According to one letter, a juror in the back row slept for ten minutes during the testimony of Dr. Welch. The second letter refers to a juror in the back row who rested his head on the wall and appeared to have his eyes closed for about ten minutes, but the letter does not indicate what was transpiring in the trial at the time. The third letter appears to refer to another juror at another time. It describes a juror in the front row who slept through most of the testimony of Dr. Green and when he awoke asked another juror: "What did he say?" The letter states that this juror slept during the testimony of a police officer and on and off during the testimony of all three doctors. Although the letter does not indicate the date on which these observations were made, the witnesses to which it refers testified on July 9 and July 10.

to replace the juror.[5] The court noted further that there was no firm evidence that the juror had been asleep. The court offered to submit to an interrogation on the record by defense counsel as to its recollection of the incidents which was confirmed by the prosecutor. The proposal was not endorsed by defense counsel. Defense counsel requested neither further investigation, nor an evidentiary hearing, into the allegations contained in the letters submitted after trial. The district court determined that any inattentiveness which may have occurred was limited to "an isolated moment" in a week-long trial, thus implicitly determining that there had been no prejudice to appellant. The motion for new trial was denied.

Appellant belatedly challenges the adequacy of the district court's investigation into the letter allegations of juror inattentiveness. The gravamen of the unpreserved claim is that the three letters allege juror inattentiveness on more than one day and *apparently* by more than one juror, whereas the district court merely addressed the inattentiveness of one juror, on July 10. According to appellant, the failure to investigate these letter allegations rendered it impossible to determine whether he was deprived of a fair trial.

The "district court has broad discretion to determine the type of investigation which must be mounted [ ]" in response to an allegation of juror misconduct. *United States v. Boylan,* 898 F.2d 230, 258 (1st Cir.), *cert. denied,*

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[5] The district court noted in its memorandum order that defense counsel vigorously opposed replacement of the inattentive juror, as a denial of defendant's "right to have his case heard by a juror of [his] choice."

111 S. Ct. 139 (1990). An evidentiary hearing is not invariably required. *Id.* (citing cases). Rather, it is the responsibility of the trial court "to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial." *Id.; United States v. Hunnewell,* 891 F.2d 955, 961 (1st Cir. 1989). A determination that no juror misconduct occurred will be overturned only on a showing that the trial court committed a "patent abuse of discretion." *Id.* Similarly, the denial of a motion for new trial is reviewed for abuse of discretion. *United States v. Soto-Alvarez,* 958 F.2d 473, 475 (1st Cir.), *cert. denied,* 113 S. Ct. 221 (1992); *United States v. Dockray,* 943 F.2d 152, 157 (1st Cir. 1991).

We find no abuse of discretion in the district court's handling of the allegations of juror inattentiveness, *see* Boylan, 898 F.2d at 258 ("district court has discretion to determine the type of investigation which must be mounted"), or in its denial of the motion for new trial. First, defense counsel neither requested an evidentiary hearing nor an investigation into the vague and conclusory allegations contained in the three letters. Indeed, the presiding judge viewed the belated allegations as "a disingenuous attempt to set aside the jury verdict." After considering the allegations, the court concluded that the "incidents" in question had been dealt with adequately by the earlier offer, at the unrecorded bench conference on July 10, to replace an inattentive juror, and by the instruction reminding all jurors of their duty to remain attentive.

Insofar as the court correctly treated the incidents collectively recounted in the three letters to have been

considered and dealt with at the unrecorded bench conference on July 10, appellant was entitled to no further relief. Notwithstanding the court's invitation, appellant chose not to challenge the judge's description as to what transpired at the unrecorded July 10 bench conference,[6] and opposed replacement of the inattentive juror. Appellant will not now be heard for the first time to challenge the district court's determination that the entire matter was dealt with during the unrecorded July 10 bench conference. *See United States v. Kimberlin*, 805 F.2d 210, 244 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987) (no error where court brought to attention of counsel that a juror appeared to be sleeping, but neither side requested juror replacement). On the other hand, insofar as appellant may have believed that the three letters collectively recounted one or more other instances of juror inattentiveness not dealt with at the unrecorded bench conference, he not only failed to avail himself of the opportunity to test the contrary recollection recorded by the court but requested neither further investigation nor an evidentiary hearing, insisting instead upon a new trial as the only acceptable remedy. *Cf. United States v. Schnabel*, 939 F.2d 197, 201 (4th Cir. 1991) (no prejudicial

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[6] In denying the motion for new trial, the district court noted that "[t]he absence of a record forces me to note my personal recollection, which varies from the aforementioned letters but is corroborated by the prosecutor. I feel it is unfair to have my unrecorded statement go to the appellate court without affording counsel an opportunity to question it. The defendant's lawyer is very experienced and sophisticated and, I am sure, not awed by any court. If he wishes, I am perfectly willing have him interrogate me on the record, in chambers, and attach a transcript of our meeting as part of this Memorandum."

error in court's refusal to grant supplementary voir dire where defendant declined court's offer to excuse juror.)

The district court did not abuse its discretion in concluding that no prejudicial juror misconduct occurred.

C. U.S.S.G. § 2H1.4(a)(2)

1. "Serious Bodily Injury"

Section 2H1.4(a)(2) provides that the base offense level for interference with civil rights under color of law is to be set six levels above the base offense level for the underlying offense. At sentencing, the district court determined that the underlying offense was an aggravated assault, as it involved "serious bodily injury." *See* U.S.S.G. § 2A2.2, comment. (n.1). Thus, the base offense level was set at 21, then adjusted upward four more levels, pursuant to U.S.S.G. § 2A2.2(b)(3)(B), because the victim suffered "serious bodily injury," which yielded a total offense level of 25.

At the outset, appellant challenges the district court finding that Peterson suffered "serious bodily injury," which he claims led the court into reversible error both in its determination that the underlying offense constituted an aggravated assault and in its further four-level upward adjustment for causing "serious bodily injury."

First, we must determine the appropriate standard of review. The parties agree that whether the assault involved "serious bodily injury" presents a mixed question of law and fact. In light of their concession, in the present case we review for "clear error." *Cf., e.g., United States v. Pilgrim Market Corp.*, 944 F.2d 14, 17 (1st Cir.

1991) (concluding that 18 U.S.C. § 3742(e) and First Circuit precedent require "clear error" review of the mixed question of law and fact relating to the grouping of counts, even though other circuits would conduct *de novo* review).[7] Under a "clear error" standard of review, "where more than one reasonable inference may be drawn from undisputed facts, 'the sentencing court's choice among supportable alternatives cannot be clearly erroneous.' " *United States v. Preakos*, 907 F.2d 7, 8 (1st Cir. 1990) (quoting *United States v. Ruiz*, 905 F.2d 499, 508 (1st

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[7] "Plain error" may even be the appropriate standard of review in the present case. Although the issue of "serious bodily injury" was contested in the district court, appellant inconsistently conceded that "the base level of 21 obviously is appropriate." A base offense level of 21 would be appropriate in the present case only if the assault was "aggravated," rather than "minor." Moreover, since there is no contention that the offense involved either a dangerous weapon or intent to commit another felony, it could be determined an aggravated assault only if it involved "serious bodily injury." *Compare* U.S.S.G. § 2A2.2, comment. (n.1) (" 'Aggravated assault' means a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm . . . , or (b) serious bodily injury, or (c) an intent to commit another felony.") *with* U.S.S.G. § 2A2.3, comment. (n.1) (" 'Minor assault' means a . . . felonious assault not covered by § 2A2.2"). Since the adjusted base offense level of 21 was not challenged below, ordinarily we would review the finding of "serious bodily injury" only for "plain error" insofar as it served as a predicate for the determination that the underlying offense constituted an "aggravated assault." *See United States v. Bello-Perez*, No. 91-2232, slip op. at 19 (1st Cir. Sept. 29, 1992) (application of guideline to specific facts reviewed only for "plain error" unless raised below); *United States v. Morales-Diaz*, 925 F.2d 535, 540 (1st Cir. 1991) (same). The issue is of no practical consequence in the present case, however, as we discern neither "clear" nor "plain" error.

Cir. 1990)); *see also United States v. McLaughlin*, 957 F.2d 12, 17 (1st Cir. 1992).

The Sentencing Guidelines define "serious bodily injury" as "injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1(j). The sentencing court supportably found that Peterson sustained injury to his inner ear The ear is "the organ of hearing and equilibrium," which includes "a fluid-filled internal ear that maintains balance and that conducts the tympanic vibrations to the auditory nerve, which transmits them as impulses to the brain." *Random House*, Unabridged (2d ed. 1987), at 613. Medical testimony was presented that upon entering the hospital Peterson complained of dizziness and tinnitus. While tests were "unrevealing," the examining neurosurgeon testified that it was "not unusual" for inner ear damage to be evidenced solely by the patient's "subjective complaints." Moreover, Peterson was hospitalized for six days as a result of the beating administered to his head, which caused severe headaches, facial bruising and hemorrhaging around the eyes and under the scalp, in addition to the inner ear injury. *See* U.S.S.G. § 1B1.1(j) (defining "serious bodily injury" as "injury involving extreme physical pain" *or* "impairment of a bodily . . . organ . . . ," *or* "requiring . . . hospitalization. . . . ").

We discern no clear error in the finding that the assault caused "serious bodily injury."

2. "Double Counting"

Finally, Newman claims for the first time that the district court engaged in impermissible "double counting," as the four level increase in the base offense level, *see* U.S.S.G. § 2A2.2(b)(3)(B), was predicated on the same finding of "serious bodily injury" that prompted the fifteen level adjustment in the base offense level for the underlying offense, *see id.* § 2H1.4(a)(2), "aggravated assault," *see id.* § 2A2.2(a).

As the "double counting" claim was not raised below, we consider whether it may be raised on appeal. Although pure issues of law may be raised for the first time on appeal in "exceptional cases," normally we will entertain an unpreserved legal claim only if the failure to do so would result in a "rank miscarriage of justice." *See United States v. La Guardia*, 902 F.2d 1010, 1012-13 (1st Cir. 1990) (listing factors); *United States v. Krynicki*, 689 F.2d 289, 291-92 (1st Cir. 1982) (same).

The district court sentenced defendant to 60 months in prison. Were it not for the challenged four level increase in appellant's base offense level under U.S.S.G. § 2A2.2(b)(3)(B), which yielded a 57-to-71 month GSR, the total adjusted offense level would have been 21, yielding a 37-to-46 month GSR. Assuming the challenged four level increase was impermissible, yet not reviewable on appeal, Newman would be compelled to serve no less than fourteen months longer than the maximum sentence allowable under the appropriate GSR. We are persuaded, therefore, that the requisite showing has been made for discretionary review of appellant's unpreserved claim.

After supportably finding that the assault caused "serious bodily injury," the sentencing court calculated appellant's base offense level in exact accordance with the plain language of the applicable sentencing guidelines. Pursuant to U.S.S.G. § 2H1.4(a)(2), the court set the base offense level at 21 – six levels above the base offense level of 15 for the underlying offense of "aggravated assault," *see* U.S.S.G. § 2A2.2(b) ("a felonious assault that involved . . . (b) serious bodily injury") – then increased it four levels, pursuant to U.S.S.G. § 2A2.2(b)(3)(B), because the victim sustained "serious bodily injury." Thus, the first hurdle appellant must overcome is that the applicable sentencing guidelines expressly mandate the "double counting" challenged on appeal.[8]

As with statutory language, *see, e.g., North Dakota v. United States*, 460 U.S. 300, 312 (1983); *Benoni v. Boston & Maine Corp.*, 828 F.2d 52, 57 (1st Cir. 1987), we think the plain and unambiguous language of a sentencing guideline affords the best recourse for its proper interpretation,

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[8] Although no appellate court has yet considered this particular "double counting" issue, there is a divergence between the two courts of appeals which have addressed the closely analogous question whether a defendant's base offense level can be increased pursuant to U.S.S.G. § 2A2.2(b)(2)(a) for using a *dangerous weapon*, notwithstanding that the same factor formed the predicate for finding the underlying offense an aggravated assault, *see* U.S.S.G. § 2A2.2(a), comment. (n.1) (" 'aggravated assault' means a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm . . . "). *See United States v. Williams*, 954 F.2d 204, 206-08 (4th Cir. 1992) ("double counting" required); *but see United States v. Hudson*, 972 F.2d 504, 506-07 (2d Cir. 1992) (expressly disagreeing with *Williams*).

cf. United States v. Williams, 954 F.2d 204, 206 (4th Cir. 1992) ("double counting" required since Sentencing Guidelines "must be applied as written"); *United States v. Florentino*, 922 F.2d 1443, 1446 (10th Cir. 1990) ("double counting" permissible where "clear and unambiguous" guideline language indicates Commission so intended) (applying § 2L1.1 adjustment for prior conviction already reflected in criminal history category). Furthermore, the district court's application of U.S.S.G. § 2A2.2(b)(3)(B) accords with the apparent intent of the Sentencing Commission as evidenced not only by the plain and unambiguous guideline language but by other intrinsic considerations as well. For example, the Commission's awareness of the sentencing excesses which flow from *impermissible* "double counting" is plainly reflected in other guideline application notes expressly forbidding it. *See, e.g.*, U.S.S.G. § 3A1.1 comment. (n.2) (no "victim related" adjustment when *offense* guideline specifically incorporates same § 3A1.1 factor); § 3A1.2 comment. (n.3) (same); § 3A1.3 comment. (n.2) (same); *cf.* § 3D1.2 comment. (n.5) (application note governing grouping of closely related counts "prevents double counting of *offense* behavior.") (emphasis added). "Under the principle of *expressio unius est exclusio alterius*, the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *United States v. Rocha*, 916 F.2d 219, 243 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991) (citing *United States v. Vickers*, 891 F.2d 86, 88 (5th Cir. 1989) ("double counting" for ransom demand pursuant to § 2A4.1(b)(1) and for extortion pursuant to § 2A4.1(b)(5) not improper)); *United States v. Curtis*, 934 F.2d 553, 555

(4th Cir. 1991) ("double counting" for more than minimal planning under § 2B1.1(b)(4) and as organizer and manager under § 3B1.1(c) not improper); *see also United States v. Goolsby*, 908 F.2d 861, 863 (11th Cir. 1990) (refusing "to fashion an exception [to "double counting"] since the Commission has demonstrated its ability to do so in those areas it has deemed an exception to be appropriate") (crime of escape considered under both § 4A1.1(d) and § 2P1.1(a)(1)). *Cf. United States v. McInnis*, 976 F.2d 1226, 1233-35 (9th Cir. 1992) (applying § 2H1.3(a)(2), (3) where "underlying offense" was deemed an aggravated assault per § 2A2.2(b)(3)(B)) ("double counting" not addressed); *but cf. United States v. Hudson*, 972 F.2d 504, 507 (2d Cir. 1992) (it is not the law in the Second Circuit that "double counting is always permissible, except when explicitly forbidden by the Guidelines") (citing cases); *United States v. Romano*, 970 F.2d 164, 167 (6th Cir. 1992) (defendant should not be penalized for same conduct under two different guideline provisions "whether or not the Guidelines expressly prohibit" doing so); *United States v. Werlinger*, 894 F.2d 1015, 1017 (8th Cir. 1990) (rule of lenity requires that Guidelines not be readily construed to multiply punishment of conduct already punished through the application of another guideline provision); *United States v. Adeleke*, 968 F.2d 1159, 1161 (11th Cir. 1992) ("double counting" proper "if the Sentencing Commission intended the result, *and* if the result is permissible because 'each section concerns conceptually separate notions relating to sentencing' ") (quoting *United States v. Aimufua*, 935 F.2d 1199, 1201 (11th Cir. 1991)) (emphasis added).

Closer to home, U.S.S.G. § 2H1.4 itself reflects that it was drafted with the excesses of impermissible "double counting" clearly in mind. In prescribing that the base offense level for interfering with civil rights under color of law is to be the greater of level 10, or 6 levels above that of the underlying offense (here, aggravated assault), the guideline application note to U.S.S.G. § 2H1.4 first directs the sentencing court to the section 2H1.1 commentary, U.S.S.G. § 2H1.4, comment. (n.1), then mandates: "Do not apply the adjustment from § 3B1.3 (Abuse of Position of Trust or Use of Special Skill)," *id.* § 2H1.4, comment. (n.2), "because the base offense level in § 2H1.4(a) reflects that the abuse of actual or purported legal authority is *inherent* in the offense," *id.* § 2H1.4, comment. (backg'd.) (emphasis added). By way of contrast, section 2H1.4 gives no indication whatever that the offense level should not be increased where the person who is deprived of his civil rights under color of law sustains bodily injury, as in the present case. We believe the reason is clear; bodily injury is *not* an inherent characteristic of the offense of interfering with civil rights under color of law.

Moreover, the immediately preceding guideline, U.S.S.G. § 2H1.3 (Use of Force of Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination: Damage to Religious Real Property), represents a deliberate Commission determination to increase the base offense level for a civil rights violation *if* the defendant inflicts bodily injury on the victim. Section 2H1.3 prescribes alternative base offense level increases depending on whether the victim sustained injury. *Id.* § 2H1.3(a)(1), (2) (increase by 10 if no injury occurred; by 15 if injury

occurred). The section 2H1.3 commentary, appearing a scant four lines above section 2H1.4 (Interference with Civil Rights Under Color of Law), explains, *"The base offense level in § 2H1.3(a) reflects that the threat or use of force is inherent in the offense."* U.S.S.G. § 2H1.3 comment. (backg'd.) (emphasis added); to which we would add, simply: unlike the offense of interfering with civil rights under color of law, *see id.*, § 2H1.4, which involves *neither* bodily injury *nor* the threatened or actual use of force as an *inherent* offense characteristic.

Finally, applying these sentencing guidelines in accordance with their plain and unambiguous language promotes proportionality in sentencing, an important congressional objective of guideline sentencing. U.S.S.G., Ch. 1, Pt. A, intro. 2, p.s. (Congress sought "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity"). U.S.S.G. § 2A2.2(b)(3) prescribes incremental sentence adjustments scaled to the severity of the bodily injury inflicted on the victim. For example, while "serious bodily injury" requires a four level increase, "permanent or life-threatening bodily injury" necessitates a six level increase. U.S.S.G. § 2A2.2(b)(3)(B-C). If we were to conclude, as appellant urges, that impermissible "double counting" resulted from the four level increase for "serious bodily injury," no increase in the offense level would be permissible even for the more egregious infliction of "permanent or life-threatening bodily injury," *see id.* § 2A2.2(b)(3)(D), where the assault likewise was determined to have been aggravated in light of the degree of bodily injury sustained by the victim, *see id.* § 2H1.4(a)(2). The carefully calibrated offense level

adjustment scheme prescribed in U.S.S.G. § 2A2.2(b)(3), *cf. Williams*, 954 F.2d at 206 (§ 2A2.2(b)(2) "rationally reflects the Guideline's graduated adjustment scheme" for possessing a weapon), would be disarranged in such cases, as the base offense level could not be increased either in response to an assault which caused "permanent or life-threatening injury," U.S.S.G. § 2A2.2(b)(3)(D), or one which caused "serious bodily injury," U.S.S.G. § 2A2.2(b)(3)(C).

Thus, in sum, we think the carefully structured sentencing scheme in Chapter Two, Part H, *as a whole*, no less than U.S.S.G. § 2H1.4 in particular, constitutes a considered *resolution* of the "double counting" issue raised on appeal, rather than evidence of the Commission's failure to recognize it. As there was no impermissible "double counting," we reject the contention that the district court was required to disregard the plain and unambiguous language of U.S.S.G. §§ 2A2.2(b)(3)(B) and 2H1.4(a)(2).

For the foregoing reasons, the sentence imposed by the district court must be affirmed.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-2303

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL J. NEWMAN,

Defendant, Appellant.

ERRATA SHEET

The opinion of this Court issued on December 31, 1993 [sic], is amended as follows:

The following language should be inserted after "concession" at p.13, 1.6 [App. 12]:

"and because the pivotal question addressed by the sentencing court – whether the victim's injuries were sufficiently extensive to constitute 'serious bodily injury' – called for a fact dominated evaluative judgment,"

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-2303

UNITED STATES,

Appellee,

v.

MICHAEL J. NEWMAN,

Defendant, Appellant.

BEFORE

BREYER, Chief Judge,
RONEY,* Senior Circuit Judge,
TORRUELLA, SELYA, CYR, BOUDIN, STAHL,
Circuit Judges, AND PIERAS,** Senior District Judge.

ORDER OF COURT

Entered: January 22, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said

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* Of the Eleventh Circuit, sitting by designation.

** Of the District of Puerto Rico, sitting by designation.

judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO

Clerk